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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 365

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, Deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS,
Petitioners,

vs.

WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Henry Escher, Ancillary Administrator of Jak. Robert Sigg-Fehr, Deceased, Gottfried Rudolph Baumann-Kienast and Edmund Gams, pray that a writ of certiorari issue to review the judgment

of the Court of Appeals of the District of Columbia entered in the above-entitled case on June 3, 1929 (R. p. 72), reversing a final order and decree entered by the Supreme Court of the District of Columbia on April 2, 1928 (R. p. 60); and in support thereof, respectfully show:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioners, as plaintiffs, brought suit in the Supreme Court of the District of Columbia under Section 9 of the Trading with the Enemy Act, alleging that they were the owners of certain property seized by the Alien Property Custodian during the war, that the seizure had been wrongfully made upon a finding that the property belonged to a certain German corporation, and praying that the property, or its proceeds and accretions, be returned to them. On January 19, 1928, a decree was entered in their favor (R. p. 46). No appeal was taken from said decree.

Pursuant to said decree, the Alien Property Custodian submitted to petitioners a partial statement of account (R. p. 53). This account showed Liberty Bonds in the amount of $489,000 par value and cash in the amount of $3,198,444.74 had been received by the Alien Property Custodian for the account of petitioners. The account did not purport to state or cover interest upon this amount of cash which had been covered into the Treasury of the United States, as required by the Trading with the Enemy Act. Disbursements from this cash in the amount of $891,000 were scheduled, leaving a net balance of $2,306,491.34, which balance, however, was scheduled as subject to "administration expense and expenses incidental to

release and additional charges of Dept. Justice, if any."

When the time came for payment, it developed that respondents had deducted and claimed the right to withhold as alleged "administration expense" the sum of $55,909.83. Petitioners disputed the rightfulness and lawfulness of this deduction and applied to the Supreme Court of the District of Columbia for a rule to show cause directed against the Alien Property Custodian and the Treasurer of the United States, as defendants, requiring them to show cause why they should not forthwith pay over the said sum thus withheld (R. p. 56). Respondents filed an answer and a motion to dismiss (R. p. 57) and petitioners filed a motion to strike the answer for insufficiency (R. p. 59). After argument an order and decree was entered in favor of petitioners finding the deduction and retention of said sum to be unlawful and without right and ordering respondents forthwith to pay said sum to petitioner (R. p. 60). From this order and decree respondents appealed to the Court of Appeals of the District of Columbia. That Court reversed the order and decree of the Court below and directed that the cause be remanded for further proceedings in accordance with its opinion (R. p. 72). Petitioners seek by this proceeding to have the case further reviewed by this Court.

QUESTIONS PRESENTED.

The issue presented to the Supreme Court of the District of Columbia and upon appeal to the Court of Appeals was the sufficiency in law of the answer of respondents to the rule to show cause. The pertinent portion of this answer is short and reads as follows:

> "Further answering said paragraph these defendants admit that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,909.83 as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid." (R. p. 58)

We respectfully ask this Court to note that this answer does not allege directly or by any reasonable inference that the sum withheld, or any part of it, had been disbursed in connection with petitioners' property, nor that it represented the amount of expenses incurred in any way in connection with respondents' property nor that it represented the cost of seizing, preserving, or administering such property. It admits the taking of this sum out of the money of the petitioners as administrative expense but does not allege that any expense had, in fact, been incurred nor does it tend in any way to justify the taking of this amount even if it had been conceded that any sum was properly withheld on this account.

The calculation shows that this sum withheld constitutes two per cent (2%) of the amount of money and property shown on the statement of account as held for petitioners.

Petitioners dispute the right of respondents to withhold any part of their money or property to be applied toward the cost of the administering of the office of the Alien Property Custodian and, in addition, claim that even if any sum can be withheld upon that ground, the Alien Property Custodian must allege and, if controverted, prove that the amount withheld represents

only a fair and reasonable cost of administering their money and property.

In particular, they dispute the right of the Alien Property Custodian to pay the expenses of running his office by appropriating from property wrongfully seized by him an amount, or fixed percentage, arbitrarily determind upon by him.

They claim that there is no statute or rule of law which does or could give to the Alien Property Custodian any such right or power. The decision of the Court of Appeals in effect sustains the act of the Alien Property Custodian in depriving petitioners of a portion of their money without due process of law and of appropriating it to public use, to wit, the administering of his office, without just compensation to petitioners.

REASONS FOR ALLOWANCE OF THIS PETITION.

1. The judgment and opinion of the Court of Appeals erroneously construes the Act of Congress, known as Trading with the Enemy Act and the various Acts amending and supplementing that statute.

2. The judgment and opinion of the Court of Appeals erroneously failed to give due effect to the provisions of the Constitution of the United States, to wit: The provisions of Article V of the amendments.

3. The questions presented here have not heretofore been specifically and directly presented to this Court.

4. The questions presented here are of major importance, involving the construction of the Act of Congress known as the Trading with the Enemy Act and the acts amending and supplementing that statute and affecting all persons, not enemies, whose property was

erroneously seized by the Alien Property Custodian, including citizens of the United States and all nations either allied with or friendly with the United States during the war.

5. The decision of the Court of Appeals by implication conflicts with the decision of the Circuit Court of Appeals for the ninth Circuit in *Vowinckel vs. Sutherland*, 24 Fed. (2nd) 196 and decisions of this Court in *Central Union Trust Company vs. Garvan*, 254 U. S. 554; *Stoehr vs. Wallace*, 255 U. S. 239; *Henkles vs. Sutherland*, 271 U. S. 298; and *Trustees vs. Greenough*, 105 U. S. 527.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the District of Columbia commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 4777, Walter O. Woods et al. vs. Henry Escher et al. and that the said judgment of the Court of Appeals of the District of Columbia may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

HENRY ESCHER, ANCILLARY ADMINISTRATOR OF JAK. ROBERT SIGG-FEHR, Deceased, GOTTFRIED RUDOLPH BAUMANN-KIENAST, AND EDMUND GAMS,

By SPIER WHITAKER,
Attorney.

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WALTER O. WOODS, AS TREASURER OF THE UNITED STATES, AND HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

No opinion upon the matter now presented was written by the Justice of the Supreme Court of the District of Columbia except to the extent that the order entered by him on April 2, 1928 (R. p. 60), might be construed as an opinion. The opinion of the Court of Appeals

of the District of Columbia reversing the order and decree of the Supreme Court of the District of Columbia has not yet been reported in the Federal reports but appears in the record (pp. 66-71), and in the Washington Law Reporter, Vol. 57, p. 472.

JURISDICTION.

The judgment of the Court of Appeals of the District of Columbia was entered on June 3, 1929 (R. p. 72).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 23, 1925 (Chapter 229, 43 St. 938).

STATEMENT OF THE CASE.

For the purpose of argument it is necessary to amplify somewhat the statement of facts in the petition.

The original suit was begun on December 8, 1921, by the filing of a bill of complaint under Section 9 of the Act of Congress known as the Trading with the Enemy Act (Chapter 106, Sec. 9, 40 St. 419). The bill of complaint alleged that the plaintiffs were citizens of the Republic of Switzerland, residing in that country; that they were the owners of certain property consisting of 12,825 shares of the capital stock of a Delaware corporation known as Locomotive Superheater Company, together with Liberty Bonds to the amount of $490,000 par value and cash, representing dividends that had accrued and accumulated upon such stock subsequent to January 1, 1917; that the Alien Property Custodian had wrongfully seized said shares of stock, bonds and cash upon the ground that the same was the property of a certain German corporation; that the said shares of stock had been wrong-

fully and without authority of law transferred by the Alien Property Custodian to the Director General of Railroads for a purported purchase price of $200 per share; that thereafter the Director General of Railroads had sold the stock for the price of $248 per share and in addition had received in dividends an additional profit of approximately half a million dollars. The relief prayed for was the return of the proceeds received from the sale of the shares of stock, the release and return of the Liberty Bonds and cash seized by the Alien Property Custodian and the release and payment over of the accumulations and additions to this money and property and the income therefrom (R. pp. 1-15 incl.). The Court of Appeals of the District of Columbia in an interlocutory decree held that the Director General of Railroads could not be joined in that action and that plaintiffs were limited in their recovery to the property seized by the Custodian and the $200 per share paid over to him by the Director General of Railroads. (285 Fed. 949)

On December 10, 1927, after a long and hard fought trial, an opinion was filed by one of the Justices of the Supreme Court of the District of Columbia, holding that the plaintiffs were entitled to the relief sought (R. p. 46). Thereafter on January 19, 1928, final decree in favor of plaintiffs was entered (R. p. 46-47).

During the course of the trial one of the original plaintiffs, Jak Robert Sigg-Fehr, died and Henry Escher was appointed ancillary administrator of his estate in the District of Columbia and substituted as a party plaintiff.

The plaintiffs claimed title to the shares of stock by virtue of a purchase in November, 1916, from a

German corporation which up to that time had been the owner. The defendants disputed the validity and *bona fides* of the purchase and the Custodian seized the property upon finding that it still belonged to this German corporation. The decree of January 19, 1928, sustained the purchase and held that the original three plaintiffs were the owners of the 12,825 shares of stock with dividends thereon declared subsequent to January 1, 1917, and directed the defendants, the Alien Property Custodian and the Treasurer of the United States, to

> "pay, convey, transfer, assign and deliver to said plaintiffs the said money and other property, or in the event any of said property shall have been lawfully disposed of, the proceeds therefrom, together with any and all income therefrom and additions and accretions thereto, after deducting therefrom any expenses or disbursements in respect of or on account of said property or any part thereof, duly made under the authority of the Trading with the Enemy Act and amendments thereto; and also deducting therefrom the sum of $10,000 to be paid to the Special Master in accordance with this decree."

This decree was consented to "as to form" (R. p. 48) and no appeal therefrom was taken.

Pursuant to this decree and in purported compliance with it, the respondents here as defendants in the Court below, submitted the statement of account that is referred to in the petition filed herewith (See copy of statement of account R. p. 53). As is stated in the petition the technical question which petitioners herein seek to have this Court review is the sufficiency in law of the answer of respondents to the rule to show

cause issued out of the Supreme Court of the District of Columbia on March 23, 1928 (See petition for rule R. p. 50-56; Rule R. p. 56-57; motion of respondents to discharge and answer R. p. 57-58; motion by plaintiffs to strike out answer for insufficiency R. p. 59-60; order R. p. 60).

The points of law which are involved, both of statutory construction and constitutional law, are stated in the summary of the argument (see page 13, *infra*).

SPECIFICATIONS OF ERRORS TO BE URGED.

The errors which petitioners urge as grounds for the granting of the writ of certiorari and for reversal of the judgment of the Court of Appeals of the District of Columbia are;

1. The Court of Appeals erred in not holding that the answer of the Alien Property Custodian and the Treasurer of the United States to the rule to show cause issued out of the Supreme Court of the District of Columbia failed to set forth any facts sufficient to justify the deduction and withholding from the money of these petitioners the sum of $55,909.83, or any part thereof.

2. The Court of Appeals erred in holding that the Alien Property Custodian had the right to deduct from the money of these petitioners any sum or sums other than the amount of expenses reasonably and actually incurred by him for protecting or administering the money and property of these petitioners and which was directly attributable to or directly incurred because of such money or other property.

3. The Court of Appeals erred in not holding that the Alien Property Custodian had no right to withhold or deduct from the money of these petitioners, as

so-called administrative expense, a percentage thereof arbitrarily fixed or determined upon by the Alien Property Custodian.

4. The Court of Appeals erred in finding that the sum of $55,909.83 deducted and withheld by the Alien Property Custodian from the money of these petitioners represents expenses incurred in protecting or administering the money and other property of these petitioners held by the Alien Property Custodian and/or the Treasurer of the United States.

5. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a depriving them of their property without due process of law in contravention of the provisions of the Constitution of the United States.

6. The Court of Appeals erred in not holding that the deduction and withholding by the Alien Property Custodian of the sum of $55,909.83 out of the money of these petitioners amounted to a taking of their property for public use without just compensation.

7. The Court of Appeals erred in not affirming the order and decree of the Supreme Court of the District of Columbia entered on April 2, 1928.

8. The Court of Appeals erred in reversing the order and decree entered by the Supreme Court of the District of Columbia on April 2, 1928.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent provisions of the Trading with the Enemy Act are printed in an appendix annexed hereto and will be referred to in the course of the argument.

In addition the provisions of the fifth amendment to the Constitution of the United States were invoked by petitioners in the Court of Appeals and are relied upon here.

SUMMARY OF THE ARGUMENT.

POINT A. The Trading with the Enemy Act, as amended, does not authorize the Alien Property Custodian to charge against and deduct from non-enemy property wrongfully seized any sum on account of the overhead or fixed expenses of administering his office, but only actual disbursements or expenses necessarily incurred in respect of or on account of the particular money and property involved and which are directly attributable thereto.

POINT B. Even if the Alien Property Custodian was and constitutionally could be authorized to charge against the money and property of petitioners any part of the general expense or overhead of his office, the appropriation therefrom of an arbitrary fixed percentage of its amount and value is not justifiable.

POINT C. Irrespective of the character of costs and expenses that may be charged against the money and property of petitioners and the basis for fixing the amount that can be charged, the amount to be deducted and withheld on such account cannot be fixed or settled by the Alien Property Custodian, but petitioners are entitled to have their day in Court as to the amount of deductions as well as the propriety of any deduction.

ARGUMENT.

These three points are closely interwoven, in fact they might almost be stated as a single point. For that reason, we shall discuss them as one in the belief that

the argument will be shortened and perhaps clarified.

Respondents predicate the right of the Alien Property Custodian to make the deduction involved in this appeal upon Section 24 of the Trading with the Enemy Act, which was added to the original Act by the amendment of March 24, 1923, generally known as the Winslow Bill; upon certain executive orders previously issued by the President under the purported authority of that Act, and upon the general principles applicable to the administration of trust property. The Alien Property Custodian being a public officer, whose rights, duties and obligations are fixed by statute and there being express statutory enactment upon this question, we submit that the statute must govern. Executive orders and executive practice no matter how long continued and general rules of equity cannot change the meaning of a statute nor enlarge its scope. We present the matter therefore solely as a question of statute and constitutional right.

The statute, omitting inapplicable clauses, reads as follows:

> "The Alien Property Custodian is authorized * * * to pay the necessary expenses incurred by him or by any depository for him in securing the possession, collection, or control of any such money or property or in protecting or administering the same. Such * * * expense, shall be paid out of the moneys or other property * * * in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that claim may have been filed or suit instituted under this Act."

For comparison with this statutory statement of the Custodian's right in this regard, we quote again the

answer of respondents to the rule to show cause, which sets forth their claim of right and their justification for the withholding now in question.

> "Further answering said paragraph, these defendants admit that the Alien Property Custodian deducted from the money determined to be the money of the plaintiffs herein the sum of $55,-909.83, as administrative expenses, said sum having been paid by the Alien Property Custodian into a fund maintained by him out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid."

This pleading was framed in disregard of the statute or the language used was intentionally selected because the pleader could not allege that the amount deducted and retained represented the "*necessary expenses* incurred by the Custodian or by any depository for him." In either event the answer is insufficient. It admits the deduction and withholding of the sum in question from the money of petitioners and then in sole justification therefor boldly and baldly states that the money was appropriated not to reimburse the Custodian for any expense of any kind incurred in connection with or on account of petitioners' money or property but to be used in administering generally the money and property held by the Custodian.

This answer can be held sufficient as a matter of law only upon the theory that the Alien Property Custodian was invested with the power of appropriating from property in his custody whatever amount he might deem required to enable his office to be administered in the way he might think suitable and proper. Even respondents do not claim any such arbitrary

power, although the arguments made in their behalf in this case when carried to their logical conclusion lead dangerously close to it.

This point alone suffices to justify the decision of the Supreme Court of the District of Columbia, in the absence of any application upon the part of the defendants (respondents here) either in the lower Court or in the Court of Appeals, to amend the answer or plead further with respect to the sum in question. However, we did not rest our case in the Court of Appeals solely upon this rather narrow technical question although we did in brief and argument make this point; nor do we predicate the application to this Court solely upon that ground. We do assert, most earnestly, however, that the effect of holding such an answer to be sufficient is to deprive these petitioners of a very substantial sum of money without giving them their day in Court. There is nothing in this answer which could be traversed or denied in any way and it tenders no issue of fact whereby petitioners, as plaintiffs, in the Supreme Court of the District of Columbia could show that the amount retained was excessive or whereby in any other way they could secure a judicial finding as to just what in fact it did cost the respondents to administer this property.

In the Court of Appeals both in written briefs and upon the oral argument, it was asserted with great earnestness on behalf of respondents, that the practice of deducting for "administrative expense" a fixed percentage of all money and property seized irrespective of the enemy or non-enemy ownership and of the rightfulness or wrongfulness of the seizure had been in effect for many years, and that a judicial decision now that this practice was unauthorized or improper,

would create chaos in the Custodian's office. It was argued also that it was impracticable to keep an exact record of the time of each person in the Custodian's organization spent upon each separate item of property or to apportion against the various items or lots of money and property held, the fixed expenses, such as salaries of the Alien Property Custodian and of other executives in his organization, rent and other similar items. These reasons, it was claimed, justified the practice of creating a fund for administering the office by appropriating from all of the money and property held a fixed or uniform percentage of the amount or value.

At the close of the argument in the Court of Appeals there was cited on behalf of appellants there, the respondents here, the Appropriation Bill for the fiscal year ending June 30, 1929, which provided that all expenses of the office of the Alien Property Custodian

> "shall be paid from interest and collections on trust funds and other properties under the control of such Custodian". (45 St. 573, 574, ch. 580)

It was argued that this enactment constituted an approval by Congress of the practice of deducting from all property in the custody of the Custodian a fixed percentage to cover so called "administrative expenses."

With respect to the money and property of these petitioners, it was asserted, although there was nothing in the pleadings and not a scintilla of proof in the record to justify it, that

> "the sum of $55,909.83, the amount here claimed, is no more than a fair and reasonable charge for collecting, protecting and administering the appellees' seized property."

The Court of Appeals, with all due deference to that Court, would appear to have been influenced unduly by this argument of expediency and to have accepted as proven the unsupported assertions of fact. The first five pages of its opinion in this case are taken up with a discussion of the War Power of seizing enemy property and a justification of the seizure by the Custodian of the money and property of these petitioners. At no time in this case has that power been questioned. Petitioners here, as plaintiffs, did assert that the seizure, although made under full authority of law, nevertheless was wrongfully made in that the property was not enemy owned and therefore not subject to final seizure. The final decree of the Supreme Court of the District of Columbia entered on January 19, 1928, so determines.

With respect to the money of Petitioners withheld by the Custodian, the Court says in a short paragraph at the end of the opinion:

> "We think it not unreasonable, in the light of the legislation, the Executive Orders, and the war power of Congress, to sustain a policy which imposes upon the property, though ultimately found to have been mistakenly seized, the expense incurred in protecting, disposing of, or investing it. This is but the application of a general rule of Civil procedure in connection with the administration of trusts. Perry on Trusts and Trustees, 6 (Ed.) Vol. 2, Sec. 910; Trustees vs. Greenough, 105 U. S. 527, 532; Woodruff vs. New York R. R. Co., 129 N. Y. 27.
>
> The decree is reversed with costs, and the cause is remanded for further proceedings not inconsistent with this opinion."

This opinion, we submit, "begs the question" which was submitted for decision. It assumes that the

amount withheld in fact represents "the expense incurred in protecting, disposing of, or investing it." In the brief filed with that Court, and upon the oral argument, particular attention was called to the state of the pleadings hereinbefore referred to, and exception was noted to the argument, made without pleading or proof to support it, that the sum withheld was no more than the cost of protecting and administering this property. We asserted then and assert now that it bears no relation whatsoever to that cost; and greatly exceeds the cost of administering the money and property of appellees upon any theory and no matter what reasonable amount of overhead be included.

We have no quarrel with the political theory that the cost of administering the Alien Property Custodian's office should be paid out of *enemy* property which was rightfully seized; nor are we called upon in this case to discuss the political advisability of delegating to the Alien Property Custodian the power of writing his own appropriation bills by leaving to him the power to take from property in his custody for administrative purposes whatever amount he may, in his uncontrolled discretion, see fit to take. As a matter of practical administration, the policy of apportioning the amount deducted for administrative expense among the owners of the seized property, according to the value of the property and the amount of money held, has much in its favor; and in so far as this is limited to enemy property that was properly seized, Congress unquestionably and undeniably has the power so to authorize and direct.

To apply this policy to non-enemy property mistakenly seized is, we submit, an entirely different thing.

The Court of Appeals refers to the reasonableness or unreasonableness of the policy in question. This, of course, is ordinarily for Congress and not the Court to consider. In this case we believe it does have a bearing both upon the construction of the statute and the constitutionality of the policy in question as applied to non-enemy property wrongfully or mistakenly seized.

We see no justice in making these petitioners pay for the mistakes of the Alien Property Custodian. It is quite true, as this Court has said (*Central Union Trust Company v. Garvan,* 254 U. S. 554, 568) that in the course of seizing enemy property mistakes would occur. The cost of such mistakes would seem to be one of the costs of conducting the war to be paid like all the other costs of the war were paid; just as in the case of industrial enterprises, the cost of accidents is considered one of the costs of conducting the business, to be borne as the other costs of that business are borne. In the case of the Alien Property Custodian, Congress may undoubtedly, if it sees fit, reimburse the Treasury out of enemy property properly seized; or provide for payment in the first instance of such costs out of such property. To make the victim of the Alien Property Custodian's mistake bear the Custodian's cost of such mistake seems to us to lack every element of reasonableness or fairness.

The distinction between such administrative costs and the expenses directly attributable to the property involved, and which the owner of the property probably or presumably would have had to pay if the property had not been seized, is one frequently recognized and given effect to by the courts. See

Greer v. Greer, 5 Redf. 214;
Weston v. Watts, 45 Hun. 219, 224;
Union Distilling Co., v. Union Pharmaceutical Company, 56 N. Y. 417, 421-422.

The case of *Trustees v. Greenough* decided by this Court, and referred to by the Court of Appeals, makes a similar distinction (See 105 U. S. 527, 537-538).

The language used in Section 24 of the Trading with the Enemy Act would indicate on its face that Congress had this same distinction in mind when the statute was enacted. If it had been intended then that the Custodian should pay out of seized property all of the expenses of running his office, the total amount to be apportioned according to the amount of the money and value of the property, it would have been a simple matter to have so stated. This statute on the contrary states first that the expense must be *necessary;* and in addition states specifically that the expense incurred in respect of each item of money or property, is to be paid out of the particular money or property in respect of which the expense was incurred. If such money or property is insufficient for that purpose, then it can be paid out of other money and property *only to the extent that other money or property is held for the same person.* None of these provisions would be necessary or even applicable if it had been intended to authorize the Custodian to create an expense fund by levying a general assessment upon all of the property in his custody.

In this connection we deem it proper to state that we do not concede the constitutionality of all of the provisions of Section 24 of the Trading with the Enemy Act. It is our view that any expense incurred in effecting seizure of property that later proves to have

been wrongfully or mistakenly seized cannot properly be charged against or paid out of such property; nor can expenses incurred by the Alien Property Custodian and/or the Treasurer of the United States in resisting the suit of the rightful owner to recover such possession be included within the purview of the word "protect." In the case of *Vowinckle v. Sutherland*, 24 Fed. (2nd) 196, the Circuit Court of Appeals for the Ninth Circuit has expressly so held. In spite of this decision the Alien Property Custodian is still continuing to tax against non-enemy property wrongfully seized, not only the expenses of the Alien Property Custodian's office incurred in attempting to prevent the original owner from recovering his property, but the expenses of the Department of Justice as well. Reference to the statement of account submitted (R. p. 53) will show the deduction of various items on this account, including one attorney's fee in the amount of $10,000; and in addition to these expenses directly attributable to this property, salaries and other expenses of the Department of Justice, so it was stated in open Court upon the hearing of the rule to show cause in the Supreme Court of the District of Columbia, are paid out of the administrative fund created by deduction of two per cent from the money and property of these petitioners and of others. The opinion of the Court of Appeals makes no reference to the Vowinckle case, but its decision conflicts directly with the decision in that case.

Furthermore we deny the constitutionality of that provision which states such expenses may be paid out of the money, or property. Furthermore we deny the constitutionality of that provision which provides that such expenses may be paid out

of the money or property held "notwithstanding the fact that a claim may have been filed or suit instituted under this act." Section 9 of the Trading with the Enemy Act has provided from the original enactment of that statute, that "If suit shall be instituted then such money or property shall be retained in the custody of the Alien Property Custodian or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court or until final judgment or decree shall be entered against the claimant or suit otherwise terminated." It was upon the strength of these very provisions that this Court sustained against the charge of unconstitutionality, the provisions of Section 7 (c) of the Act which were interpreted as granting to the Custodian the power of seizing property "supposed to belong to the enemy" and then requiring the true owner, if not an enemy, to assert his claim and establish his right to return of the property by suit under Section 9 (*Central Union Trust Company v. Garvan, supra*). If, notwithstanding suit disputing the rightfulness of the Custodian's seizure, the Custodian can appropriate out of the seized property, without notice to the owner and without any opportunity of protest or hearing, judicial or otherwise, whatever amount the Custodian might see fit to take under the guise of administrative expense or for payment of taxes, then something more is gained by the seizure than mere custody and the property is not merely attached "to make sure that it is forthcoming

if finally condemned and no more." This Court in that case construed the statute as requiring that "the property in case of suit is to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result." This means the whole of the property and not such part as may be left after the custodian has made his deductions. Unless the statute as a whole does make such requirement the remedy of Section 9 is far from adequate. This provision of section 24, inserted long after the enactment of the original statute and after the act had been held constitutional, because it provided just the opposite of this provision, and after all seizures and the right to make seizures had ceased, must be held both unfair and unconstitutional.

But, to return from this digression to the matter of general expense or overhead of the Custodian's office, we submit that even if such costs of running the Custodian's office be held as coming within the purview of this statute, nevertheless it does not follow that the amount deductible on such account is measureable or determinable by the value of the money or property involved. It is quite true that trustees of trusts voluntarily created, insurance premiums, lawyers' fees and other charges are often measured by the value of the property in respect of which the services have been rendered or the charges made. These cases are in no way analagous to the present situation. In such cases it is the benefit to the property or to the owner of the property and not the cost of the service of the person rendering the service which justifies measuring the charge by the value of the property. Such charges in addition include an element of compensation or profit. The Custodian, under no

theory of law or justice can make a profit out of non-enemy property wrongfully seized. The utmost that under any theory he can tax against such property is *actual cost* of administration—pretermitting discussion of just what kinds of expense are to be included within that term. That the cost of taking care of property is not measured by its value is one of those self evident truths of which a court will take judicial notice.

We take it to be fundamental that to take from property mistakenly or wrongfully seized by the Custodian, one cent more than the actual expense of protecting or administering such property, and to apply the money so appropriated to the general cost of administering the office of the Alien Property Custodian, amounts to the taking of such money for public use without just compensation and deprives the owner of such money of his property without due process of law.

To summarize, these petitioners contend:

First: That no part of the overhead or fixed expenses of administering the Custodian's office can be assessed against or paid out of their money and property mistakenly and wrongfully seized; that, as a matter of fact, such expenses would have been incurred by the Custodian, regardless of the seizure of petitioner's property; that there is no fairness or justice in making them pay for the mistake of the Alien Property Custodian in seizing their property; that the costs of such mistake should be borne by the United States as all of the other costs of carrying on the war were borne; and that Section 24 of the Trading with the Enemy Act, in which, if anywhere, the right to make the deduction must be found, does not contemplate or authorize the taxing of any such charges but only "ex-

penses necessarily incurred'' in respect of the money and property of these petitioners.

Second: That the policy of assessing seized property with two per cent of its value for ''administrative expenses'' assumes that the cost of administration is measured by the value of the property, which assumption is not true as a matter of fact and not justified as a matter of law.

Third: That even if it be permissible to deduct a percentage of the money and property mistakenly and wrongfully seized to cover the costs of ''protecting and administering'' such money and property, the percentage and therefore the amount to be deducted must be subject to judicial review; and unless the owner of such money and property is given his day in court as to the amount to be deducted and withheld under the guise of administrative expense, no matter by what method or rule such amount is to be measured, such owner is deprived of his property in violation of the provisions of the constitution.

We deem it unnecessary to cite to this court its decisions holding that these constitutional provisions protect the alien as well as the citizen, and the owners of this property at the time of seizure, having been citizens of the Republic of Switzerland, a friendly nation, are entitled to the same treatment which would be accorded to a citizen of the United States whose property had been seized by the Alien Property Custodian upon a mistaken assumption that it belonged to an enemy under the Trading with the Enemy Act. For these reasons it is respectfully submitted that the petition for a writ of certiorari in support of which this brief is filed, should be granted and the decision

of the Court of Appeals of the District of Columbia reviewed by this Court.

Respectfully submitted,

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APPENDIX.

The pertinent Sections of the Act entitled "An Act to define, regulate, and punish trading with the enemy and for other purposes," are as follows:

"*Section 7(c)* If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act. * * *

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." Act of October 6, 1917, as amended November 4, 1918.

"*Section 9(a)* That any person not an enemy or ally of enemy claiming any interest, right, or

title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the

court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the Court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.'' Act of October 6, 1917, as amended June 5, 1920.

'*Section 12* The Alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the obsolute owner thereof: *Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of

time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the Alien Property Custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the Alien Property Custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The Alien Property Custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

"*Section 24.* The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, col-

lection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act." Act March 4, 1923.

ARTICLE V.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.